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No. 109, Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

EXCEPTIONS OF THE STATE OF TEXAS TO REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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December 20, 1990

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No. 109, Original

IN THE
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October Term, 1990

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v.

STATE OF NEW MEXICO,

Defendant.

TEXAS' EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

The Court ordered the October 15, 1990, Report of the Special Master filed on November 5, 1990. In these exceptions and in the supporting brief, the Special Master's 1990 Report will be referred to as the Report.

Texas accepts the Report, except for two matters. Texas objects to the recommendation in Section VIII that the Court remand to the Canadian River Commission the issue of whether a portion of the water stored in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a desilting pool component of sediment control. Texas also objects to the recommendation in Section V that the Court articulate new procedural prerequisites and guidelines in interstate compact litigation.

Respectfully submitted,

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STATE OF NEW MEXICO,
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TEXAS' BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

1. Should the Court remand to the Canadian River Commission the issue of whether a portion of the water stored above dead storage in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a desilting pool component of sediment control.

2. Should the Court articulate new procedural prerequisites and guidelines for interstate compact litigation.

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JURISDICTION

The original jurisdiction of the Court was invoked under Article III, section 2, clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a)(1).

STATUTE INVOLVED

The Canadian River Compact, 66 Stat. 74 (1952) governs this case. The Compact is included in Appendix A of this brief.

STATEMENT OF THE CASE

The Report accurately summarizes this controversy and correctly recounts the procedural history of the case and the background of the dispute. Report at 1-22. Texas offers one clarification. The Special Master sets out a table reflecting the impact of his recommendations and the parties' contentions as to the amount of stored water in New Mexico allocated to Article IV(b) classifications on June 23, 1988. Report at 111. Some of these figures, including the total conservation storage, are based upon the amount of water impounded in Ute Reservoir on that date. The amount of water impounded, and thus the extent of New Mexico's violation, has been considerably greater on other dates. Report at 17; *see also* Agreed Material Facts F-9 through F-14.

SUMMARY OF ARGUMENT

The Court should reject New Mexico's claimed desilting pool exemption rather than remand that issue to the Canadian River Commission. New Mexico has not shown that a desilting pool serves a legitimate engineering sediment control purpose that would be entitled to exemption under Article II(d) of the Compact. Even if the Compact could be interpreted to exempt such a pool, the record shows conclusively that New Mexico does not have any

present need for a desilting pool. If New Mexico should develop such a need in the future, the Commission could then consider a request for redesignation of the pool pursuant to Paragraph (5) of the Recommended Decree.

The Special Master's recommended prerequisites for judicial relief are unnecessary. The Court already has the means of requiring reasonable efforts to resolve compact disputes when states seek to invoke its original jurisdiction. One state's reluctance to negotiate resolution of a compact dispute should not be allowed to prevent or delay another state's ability to invoke the Court's original jurisdiction. The Special Master's recommendation to restrict review to the record and arguments made before a compact commission would be unduly burdensome on the states. The Canadian River Commission is not a federal agency and is not structured or empowered to function as one. It is important that the record be developed under the neutral control of a Special Master.

ARGUMENT

I.

The Court Should Reject New Mexico's Claimed Desilting Pool Exemption Based on the Existing Record

In Section VIII of his Report, the Special Master recommends that the Court remand to the Canadian River Commission the question whether a portion of the water stored above dead storage[1] in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a "desilting pool" component of sediment control. The Special Master acknowledged that the record,

[1]Dead storage in Ute Reservoir is the portion of the reservoir below the permanent outlet works at elevation 3725. The claimed desilting pool is water stored between elevations 3725 and 3741.6. *See* Report at 89-90.

although "sparse," "probably provides an adequate basis for a decision." Report at 99-100. His recommendation that this issue be remanded undoubtedly flows from his proposed prerequisites and guidelines to judicial relief in future interstate compact disputes. These prerequisites are set out in Section V of his Report and are discussed by Texas in its second exception herein. Regardless of the merits of the proposed prerequisites and guidelines, they are inapplicable to this case because the Court has already accepted jurisdiction and should pass on all questions and issues. *See Kentucky v. Indiana*, 281 U.S. 163, 177 (1930).

New Mexico's claim for a desilting pool is based on its assertion that the pool would be needed to protect pumps which may be installed in Ute Reservoir to withdraw water for the proposed Eastern New Mexico Water Supply Project ("Project"). New Mexico's Motion for Summary Judgment at 20. However, the record in this litigation does not establish that a desilting pool is a legitimate engineering component of the sediment control function of Ute Reservoir. The Special Master recognized that nothing in the literature in 1950 or since supports New Mexico's claim that use of a desilting pool in addition to dead storage was a recognized practice encompassed within the concept of "sediment control" in Article II(d) of the Compact. Report at 96. The Special Master further found that the Compact negotiators did not include the concept of a desilting pool in the sediment control exemption. Report at 97. A desilting pool, the Special Master concluded, is "a concept which, however much technical merit New Mexico may believe it has, must be viewed as unprecedented." Report at 99.

Even if the desilting pool concept could be shown to be technically supportable, New Mexico's claim for a desilting pool exemption in Ute Reservoir is premature. The Project for which the desilting pool is claimed does not exist today and the record establishes that there is serious question that it will ever exist. Although the feasibility of the Project has been studied since 1972, it has not been authorized or

funded.[2] P. Ex. 142 at 1. The amount of water available for the Project has declined and some prospective customers have lost interest in it. Report at 91. Recent cost estimates have substantially increased to $1,280 per acre-foot of water for a project that would supply 18,400 acre-feet per year, and $1,640 per acre-foot of water for an alternative down-sized project delivering 10,500 acre-feet per year. P. Ex. 142 at 54-56.[3] In light of these problems, Ute Reservoir may never be used as a major municipal and industrial water supply and New Mexico may never need to seek Commission approval for a redesignation of part of its conservation storage as a pool for desilting purposes.

The Special Master, despite making determinations that amply support a decision on the merits, proposes a remand to the Commission because the concept of a desilting pool "may constitute the kind of evolution of reservoir operating concepts which presents an issue of Compact interpretation appropriate for consideration and disposition by the Commission in the first instance." Report at 97. While Texas agrees that the Commission may address evolutionary concepts, New Mexico's claim for an exempt desilting pool should not be taken up by the Commission until the Project is closer to being a reality. Under the current circumstances, a remand to the Commission would only exacerbate and prolong the injury to the downstream states caused by New Mexico's unilateral assertion of this unprecedented exemption.

New Mexico is claiming an exemption for the pool because it is actually being maintained as a minimum pool for recreation purposes pursuant to a contract between the New Mexico Interstate Stream Commission and the New

[2]Even after authorization and funding, the Bureau of Reclamation estimates that it will require seven years to design and construct the Project. P. Ex. 142 at S-2.

[3]These Bureau of Reclamation cost estimates assume 100% non-federal financing at 9% interest. P. Ex. 142 at 55.

Mexico Department of Game and Fish. *See* Report at 90. New Mexico wants to retain the benefit of that recreation pool and still have its full 200,000 acre-feet of conservation storage under Article IV(b) available for determining the feasibility of the Project. New Mexico will continue to use Ute Reservoir for recreation purposes regardless of whether the Project ever becomes a reality. Such recreation use has been very lucrative for the state. *See, e.g.*, P. Exs. 121 - 125. Of course, if the feasibility of the Project is more important than the recreation use of the reservoir, the two New Mexico state agencies can cancel or amend their contract.

The controversy over New Mexico's claimed exemption of the water in this pool began with the commencement of the enlargement of Ute Reservoir in 1982. Report at 19. New Mexico first asserted that the water was exempt as a recreation and sediment control pool. This assertion was the subject of Commission meetings in 1982 and 1983, and was the focus of a 1983 Commission assignment to the Legal Committee to study and report on legal questions arising out of New Mexico's enlargement of Ute Reservoir. Report at 20-21; *see also* P. Ex. 97AA at 9-10; P. Ex. 98F at 56-62. Texas and Oklahoma, but not New Mexico, prepared and presented reports on these questions at the 1984 Commission meeting. Report at 21; *see also* P. Ex. 97BB at 5-6; P. Ex. 98G at 36-42. Two months later, New Mexico unilaterally issued operating criteria for Ute Reservoir declaring the water exempt as a desilting pool as well as a recreation pool. Report at 21; *see also* P. Ex. 81 at 1-2. Unsuccessful efforts to resolve the controversy continued at Commission meetings in 1985, 1986, and 1987. Report at 21-22; *see also* P. Exs. 97CC, 97DD, 97EE. Throughout all of this controversy, New Mexico has treated the pool as exempt and withheld the water from the downstream states.

The primary function of the Compact is to provide for the equitable division of the waters of the Canadian River by imposing limitations on the allocation of reservoir storage. It is essential to that function that storage allocation

be accomplished through an orderly and equitable procedure such as that set out in Paragraph (5) of the Special Master's Recommended Decree. Under Paragraph (5), the designation or redesignation of storage volumes for purposes exempt from conservation storage chargeability cannot be made unilaterally by a state but must receive Commission approval, which cannot be unreasonably withheld. Report at 113.

Paragraph (5) expresses the Special Master's appropriate concern for preventing unilateral action by a state to exempt reservoir storage. Remand of the desilting pool issue under Paragraph (10) of the Recommended Decree runs counter to this concern by letting New Mexico keep the benefit of its unilaterally declared exemption pending Commission consideration and, as appears likely, ultimate resolution by the Court.

The water in the desilting pool should be classified as conservation storage and charged against New Mexico's Compact allocation until such time as the Commission may determine otherwise. If and when the need arises for New Mexico to utilize Ute Reservoir to serve the Project, it could request a redesignation of storage under Paragraph (5) of the Recommended Decree. The Commission could then consider all relevant factors, including those suggested by the Special Master: the propriety of the desilting pool classification at Ute Reservoir; the appropriate amount of such storage, if any, that should be exempt from Compact chargeability if it is not used solely for desilting purposes; whether such a designation, if appropriate, may be premature; the comparability of storage allocation at Ute Reservoir to that at Lake Meredith; and the views of appropriate federal and state agencies. Report at 100.

A recent order by a Special Master in another original proceeding involving an interstate water compact may be informative and is included herein as Appendix B.

In the Decision of Special Master on Colorado Motion to Stay, *Kansas v. Colorado*, No. 105, Original, Special Master Arthur L. Littleworth denied Defendant's Motion to Stay Based on Kansas' Failure to Exhaust its Administrative Remedies. He ruled that the plaintiff had made reasonable efforts to resolve the dispute at the compact commission level and that remand "would not prove effective, nor would further delay be fair." Special Master Decision, October 21, 1988, in Appendix B at 14.

Summary

The issue whether New Mexico has established a legal right to an exemption under Article II(d) of the Compact for a desilting pool in Ute Reservoir is fully amenable to decision now by the Court. New Mexico was given a full opportunity in the proceedings before the Special Master to establish a legal entitlement to its claimed exemption, but failed to do so. The record demonstrates that the desilting pool concept was not encompassed within the concept of sediment control when the Compact was negotiated and that the Project which allegedly would benefit from the desilting pool will not be a reality for many years, if ever. The record before this Court justifies rejecting New Mexico's claim.

New Mexico may seek a redesignation from the Commission if circumstances change regarding the imminent development of the water supply project. Unless circumstances do change, remanding this issue to the Commission would likely result in an impasse, resolvable only by the Court. *See Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

An upstream state should not get the benefit of a novel claim for exempting water from chargeability under the Compact until that claim is approved by the Commission. New Mexico should not continue to enjoy its *de facto* exemption based upon a claim of a need to desilt water to

protect pumps that do not now exist and are part of a project that may never become a reality.

The Court should hold that the approximately 25,100 acre-feet of water stored in Ute Reservoir in the so-called "desilting pool" is conservation storage subject to New Mexico's Article IV(b) limitation, and it should allow the injuries suffered by the downstream states to be determined and redressed accordingly.[4] Paragraph (10) of the Recommended Decree should be rejected. The part of Paragraph (6) related to the remand should be modified so that Paragraph (6) reads as follows: "All water currently stored in Ute Reservoir is conservation storage, except water in dead storage below elevation 3725."

II.

The Recommended Prerequisites and Guidelines for Judicial Relief are Unnecessary and Unduly Burdensome

In Section V of his Report, the Special Master recommends that the Supreme Court use the present litigation to articulate jurisdictional prerequisites and procedural guidelines for application in future litigation arising out of interstate compacts.[5] He recommends requiring the attorney general of a state seeking to invoke the Court's jurisdiction over an interstate compact dispute, or responding to such a request, to certify that the state had negotiated in

[4]It is unclear how the recommended remand would harmonize with Paragraph (9) of the Recommended Decree, which would refer the case to the Special Master for determination of any injury sustained by Plaintiffs and to recommend appropriate relief. The decision on the desilting pool issue will have a significant impact on the extent of Plaintiffs' injury and on appropriate remedies.

[5]The Special Master's recommended prerequisites and guidelines would apparently apply to all interstate compacts, not just to water allocation compacts. Texas has not analyzed the possible impacts on other compacts.

good faith in an attempt to resolve the dispute. Report at 32-33. Texas objects to this recommendation to the extent that it would require a state to make more than reasonable efforts to settle an interstate compact dispute.

The Special Master also recommends that the Court restrict its original and exclusive jurisdiction over interstate compact litigation by limiting review to an "administrative record" compiled by the compact commission, absent good cause shown to adduce additional evidence, and by limiting legal arguments to those presented to the compact commission. Report at 33. Texas objects to these guidelines because they would constitute unnecessary hurdles for states needing relief from compact violations.

States are not required to make more than reasonable efforts to implement compacts and resolve compact disputes

The Special Master appears to be recommending that the Supreme Court require states to make more than reasonable efforts to settle an interstate compact dispute. The Special Master finds that congressional consent to compacts imposes an implied duty that "when states enter into a compact they undertake an implied commitment to make the compact work and to take no affirmative or dilatory action that would frustrate its purpose" and "to participate in good faith in the implementation of the compact plan to carry out its purposes." Report at 30-31. The Special Master further finds that this implied commit ment includes a duty to negotiate in good faith to resolve disputes as a condition to invoking the Court's jurisdiction. Report at 31-32. If the Special Master means that Congress, by granting its consent to a compact, implicitly and unilaterally imposed a duty on compacting states to make more than reasonable efforts to resolve disputes, it may be an impermissible encroachment on the Supreme Court's original jurisdiction under Article III of the U.S. Constitution. *See California v. Arizona*, 440 U.S. 59, 65 (1979).

It is unclear whether the Special Master would have imposed a stricter standard upon Texas and Oklahoma than was applied by the Court when it granted Plaintiffs' Motion for Leave to File Complaint in the instant case. In the Special Master's view, the record in this proceeding did not show sufficient negotiation before the Commission of the issues litigated. Report at 34. However, in his "Statement of the Background of the Dispute," the Special Master sets out facts that demonstrate that Texas and Oklahoma did attempt, through the Commission, to resolve all issues except the defenses that New Mexico first raised after the Plaintiffs sought to invoke this Court's jurisdiction. Report at 19-22. The Special Master further acknowledges that:

> Texas and Oklahoma . . . sought to resolve their concerns with the enlargement of Ute Dam by negotiations within the Commission rather than immediately seeking to invoke the Court's original jurisdiction, negotiations in which New Mexico appears to have been a reluctant participant.

Report at 37.

Certainly New Mexico's reluctance to negotiate resolution of the disputed issues should not have affected Texas' and Oklahoma's ability to invoke the Court's original jurisdiction in this action. The Plaintiffs' efforts to resolve the dispute at the Commission were set out in their Complaint and Brief in Support of Motion for Leave to File Complaint. Complaint and Brief at 9, 30-31. By granting the motion, the Court implicitly determined that those efforts were adequate. *See Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

A state benefiting from a compact violation has little incentive to negotiate an end to the violation. If the injured state is required to do more than make a reasonable effort to resolve a dispute, the violating state's bargaining position would be further strengthened. The Special Master

recommends that sanctions be available if the Court finds that a state had not negotiated in good faith. Report at 33. However, the Court can already impose sanctions if it concludes that a state had not made a reasonable effort to resolve a dispute — and it should impose such sanctions on New Mexico in the present case. To be effective, sanctions should be sufficient to remove any economic benefit gained by a state violating a compact.

The Special Master suggests that the requirement of good faith negotiations would serve a function analogous to the doctrine of primary jurisdiction. Report at 32. This doctrine is used to allow an agency to apply expertise to factual issues not within the conventional experience of judges, to allow the exercise of administrative discretion, and to promote uniformity and consistency in a regulatory scheme. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). The doctrine is inapplicable here because there are no material factual issues that remain to be decided to resolve the controversy and because the Commission is not administering a regulatory scheme. In addition, the resolution of the disputes in this case does not require unique expertise outside the conventional expertise of judges.

The record and legal arguments should not be restricted to those made before the compact commission

The Special Master suggests that the Court adopt procedures analogous to those used to review federal agency action, and confine its review in compact cases to the record compiled and arguments made in compact commission proceedings. Report at 33. A compact commission, however, is not a federal agency.

> No state or federal intent to create a federal agency is shown. The use of interstate compacts is diminished if they create a federal

> administrative agency subject to all the ramifications of federal statutes and federal decisions delineating the scope of judicial review of administrative action. As said in *California Tahoe Regional Planning Agency v. Jennings*, 9 Cir., 594 F.2d 181, 190 (1979), cert. denied 444 U.S. 864, the consent of Congress 'did not make applicable to the agreement the entire panoply of *federal* administrative and substantive standards.' [Emphasis in original.]

Special Master's Report and Recommendations, *Texas v. New Mexico*, No. 65, Original, September 10,1982, ordered filed 459 U.S. 940 (1982).

Unlike a federal agency, the Canadian River Commission does not have the expertise or the experience to handle contested hearings and to decide contested legal issues. The Commission is not a forum where complex legal issues are litigated and where an impartial decision-maker summons witnesses, presides over hearings conducted according to the rules of evidence, renders objective rulings, and compiles formal administrative records.

The Commission has no authority other than that expressed in the Compact. The Compact, designed to be largely self-executing, sets out minimal functions and imposes minimal duties, and does not empower the Commission to conduct formal adjudicative proceedings. The Commission consists of one commissioner from each state and a non-voting federal commissioner. Any action by the Commission requires the unanimous consent of the three state commissioners. There is no mechanism within the Compact to resolve an impasse.

The Canadian River Commissioners, like compact commissioners generally, are different from federal hearings examiners deciding cases for federal agencies. They are

political appointees of various backgrounds and experience who serve the states that appointed them, rather than acting as objective triers-of-fact. *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979).

Given the structure of the Commission and the requirement that action be by unanimous agreement, it is difficult to see how a formal adjudicative record could be compiled on matters over which the Commission was at an impasse. Commissioners unable to agree on the merits of a matter probably could not agree to convene a formal hearing. Even if they convened a hearing, the impasse on the merits would likely be reflected in disagreement on evidentiary rulings and procedural questions.

Another problem with restricting the Court's review to the record compiled by a compact commission is that it would remove the scrutiny of a neutral Special Master from the process of creating and controlling the record. Parties would attempt to submit all remotely favorable material into the record, regardless of the relevance of the material. The Commissioners might not be able to agree to admit any evidence into the record. Conversely, they might agree to admit all offered evidence. In the first scenario, the result would be a useless record; in the second, it would be an unwieldy, cumbersome record containing much extraneous and irrelevant material. Neither record would offer a sound basis for decision.

Furthermore, the Special Master would not have the advantage of assessing the credibility of live witnesses or asking them questions. It is more difficult to understand and appropriately weigh testimony and exhibits from a cold record then from live proceedings. *See Colorado v. New Mexico*, 467 U.S. 310, 326 (1984) (Stevens, J., dissenting).

Limiting the states to the legal theories raised before the compact commission could result in incomplete resolution of disputes and piecemeal litigation. Where

states are before the Supreme Court for the determination of a controversy between them, the Court must pass upon every question essential to such a determination. *See Kentucky v. Indiana*, 281 U.S. 163, 177 (1930).

Summary

The Special Master's recommendations are, commendably, intended to reduce the number of interstate compact disputes requiring resolution by the Court.[6] Although good faith negotiations could be expected to resolve some compact disputes, the recommendations do not include an effective mechanism for ensuring that good faith negotiations actually take place. As a result, it is more probable that the requirements would serve only to delay resolution of most interstate compact disputes. The recommendations would place additional burdens on states needing relief from compact violations out of proportion to any benefits gained. The best way to reduce litigation over interstate compacts is to deter violations by affording prompt, meaningful, and complete relief to injured states.

CONCLUSION

For the foregoing reasons, the exceptions of the State of Texas to the Report should be sustained. The Court should reject New Mexico's claim for a desilting pool exemption in Ute Reservoir and should classify that pool as conservation storage under Article IV(b) of the Compact. The Court should decline to impose a more rigorous negotiating requirement on states seeking to invoke its original jurisdiction to resolve interstate compact disputes. The Court should also decline to limit the records and arguments in interstate compact actions to those made before

[6]It is conceivable, however, that the recommendations could result in increased litigation involving more minor compact issues. A compact commission unable to reach agreement on a *de minimis* matter might refer it to the Court more readily if creation of a record before a Special Master were not required.

compact commissions. The Court should assess all costs of this litigation against New Mexico as a sanction for failing to make reasonable efforts to resolve this dispute at the Commission level. The Court should adopt the Special Master's Recommended Decree, with the modifications requested on page 8 herein. In all other respects, the Court should adopt the recommendations in the Report.

Respectfully submitted,

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APPENDIX A

APPENDIX A

CANADIAN RIVER COMPACT

The State of New Mexico, the State of Texas, and the State of Oklahoma, acting through their Commissioners, John H. Bliss for the State of New Mexico, E. V. Spence for the State of Texas, and Clarence Burch for the State of Oklahoma, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting Canadian River as follows:

ARTICLE I

The major purposes of this Compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

ARTICLE II

As used in this Compact:

(a) The term "Canadian River" means the tributary of Arkansas River which rises in northeastern New Mexico and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River.

(b) The term "North Canadian River" means that major tributary of Canadian River officially known as North Canadian River from its source to its junction with Canadian River and includes all tributaries of North Canadian River.

(c) The term "Commission" means the agency created by this Compact for the administration thereof.

(d) The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

ARTICLE III

All rights to any of the waters of Canadian River which have been perfected by beneficial use are hereby recognized and affirmed.

ARTICLE IV

(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

(c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

ARTICLE V

Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below:

(a) The right of Texas to impound any of the waters of North Canadian River shall be limited to storage on tributaries of said River in Texas for municipal uses, for household and domestic uses, livestock watering, and the irrigation of lands which are cultivated solely for the purpose of providing food and feed for the householders and domestic livestock actually living or kept on the property.

(b) Until more than three hundred thousand (300,000) acre-feet of conservation storage shall be provided in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs in the drainage basin of Canadian River east of the 97th meridian, the right of Texas to retain water in conservation storage, exclusive of waters of North Canadian River, shall be limited to five hundred thousand (500,000) acre-feet; thereafter the right of Texas to impound and retain such waters in storage shall be limited to an aggregate quantity equal to two hundred thousand (200,000) acre-feet plus whatever amount of water shall be at the same time in conservation storage in reservoirs in the drainage basin of Canadian River in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs east of the 97th meridian; and for the purpose of determining the amount of water in conservation storage, the maximum quantity of water in storage following each flood or series of floods shall be used; provided, that the right of Texas to retain and use any quantity of water previously impounded shall not be reduced by any subsequent application of the provisions of this paragraph (b).

(c) Should Texas for any reason impound any amount of water greater than the aggregate quantity

specified in paragraph (b) of this Article, such excess shall be retained in storage until under the provisions of said paragraph Texas shall become entitled to its use; provided, that, in event of spill from conservation storage, any such excess shall be reduced by the amount of such spill from the most easterly reservoir on Canadian River in Texas; provided further, that all such excess quantities in storage shall be reduced monthly to compensate for reservoir losses in proportion to the total amount of water in the reservoir or reservoirs in which such excess water is being held; and provided further that on demand by the Commissioner for Oklahoma the remainder of any such excess quantity of water in storage shall be released into the channel of Canadian River at the greatest rate practicable.

ARTICLE VI

Oklahoma shall have free and unrestricted use of all waters of Canadian River in Oklahoma.

ARTICLE VII

The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no State shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period not exceeding twelve (12) months; and provided further than no State or user of water within any State shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded.

ARTICLE VIII

Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact.

ARTICLE IX

(a) There is hereby created an interstate administrative agency to be known as the "Canadian River Commission." The Commission shall be composed of three (3) Commissioners, one (1) from each of the signatory States, designated or appointed in accordance with the laws of each such State, and if designated by the President an additional Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum. A unanimous vote of the Commissioners for the three (3) signatory States shall be necessary to all actions taken by the Commission.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the three (3) States and be paid by the Commission out of a revolving fund hereby created to be known as the "Canadian River Revolving Fund." Such fund shall be initiated and maintained by equal payments of each State into the fund in such amounts as will be necessary for administration of this Compact. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Said fund shall not be subject to the audit and accounting procedures of the States. However, all receipts and disbursements of funds handled by the Commission shall be audited by a qualified independent public accountant at regular intervals and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission may:

(1) Employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;

(2) Enter into contracts with appropriate Federal agencies for the collection, correlation, and presentation of factual data, for the maintenance of records, and for the preparation of reports;

(3) Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies.

(d) The Commission shall:

(1) Cause to be established, maintained and operated such stream and other gaging stations and evaporation stations as may from time to time be necessary for proper administration of the Compact, independently or in cooperation with appropriate governmental agencies;

(2) Make and transmit to the Governors of the signatory States on or before the last day of March of each year, a report covering the activities of the Commission for the preceding year;

(3) Make available to the Governor of any signatory state, on his request, any information within its possession at any time, and shall always provide access to its records by the Governors of the States, or their representatives, or by authorized representatives of the United States.

ARTICLE X

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States to the Indian Tribes;

(b) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact;

(d) Applying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact;

(e) Establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XI

This Compact shall become binding and obligatory when it shall have been ratified by the Legislature of each State and approved by the Congress of the United States. Notice of ratification by the Legislature of each State shall be given by the Governor of that State to the Governors of the other States and to the President of the United States.

The President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, The Commissioners have executed four (4) counterparts hereof, each of which shall be and constitute an original, one (1) of which shall be deposited in the archives of the Department of State of the United States, and (1) of which shall be forwarded to the Governor of each State.

DONE at the City of Santa Fe, State of New Mexico, this 6th day of December, 1950.

/s/ John H. Bliss

John H. Bliss
Commissioner for the
State of New Mexico

/s/ E. V. Spence

E. V. Spence
Commissioner for the
State of Texas

/s/ Clarence Burch

Clarence Burch
Commissioner for the
State of Oklahoma

APPROVED:

/s/ Berkeley Johnson

Berkeley Johnson
Representative of the
United States of America

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,	)	
	)	
Petitioner,	)	No. 105, Original
	)	October Term, 1985
v.	)	
	)	
STATE OF COLORADO,	)	
	)	
Respondent.	)	
	)	

DECISION OF SPECIAL MASTER ON COLORADO MOTION TO STAY

Colorado filed a Motion to Stay Based on Kansas' Failure to Exhaust Its Administrative Remedies. The Motion dealt with two of the several issues in the Complaint: i.e., post-Compact well development in Colorado, and the operation of Trinidad Reservoir. The Motion was fully briefed, and oral argument was held in the Federal Court of Appeal in Pasadena, California on September 28, 1988. David W. Robbins, Esq. argued the Motion for Colorado, and Richard A. Simms responded for Kansas.

Kansas acknowledges that it has an obligation, before seeking judicial relief, to exhaust its administrative remedies under the Arkansas River Compact. The Compact was ratified by the respective legislatures of each state, and approved by Congress in 1949. (Act of May 31, 1949, 63 Stat. 145) The Compact Administration is similar to that discussed in *State of Texas vs. State of New Mexico* (1983) 462 U.S. 554, 77 L.Ed.2d 1; 103 S.Ct. 2558. The Administration consists of three representatives from each state, but each state ". . . shall have but one vote in the Administration and every decision, authorization or other

action shall require unanimous vote." (Article VIII-D) While a representative of the United States chairs the Administration, he has no vote. (Article VIII-C)

Only two specific remedies for alleged Compact violations are provided for in the Compact. It provides that violations shall be "promptly investigated" by the Administration, although the procedure for the investigation and any remedies still require agreement between the states. (Article VIII-H) In addition, disputes "may," by unanimous vote, be referred for arbitration. (Article VIII-D) Both parties agree that the exhaustion test under the circumstances involved here is whether a state has made a "reasonable effort" to proceed first through the Compact Administration. Colorado also acknowledges that it is proper to seek judicial relief if an investigation by the Administration reaches an impasse. (Colo. Br., p. 21) Colorado, as part of its Motion, filed four large volumes of Appendix documents, going back several years, which appear to include the Compact Administration record with respect to post-Compact well development and the operations of Trinidad Reservoir. Both parties relied upon this record in their briefs and arguments.

Kansas argues first that the exhaustion issue was actually decided by the United States Supreme Court when it authorized the filing of Kansas' Complaint. Kansas moved to file its Complaint on December 16, 1985, alleging that the State of Colorado and its water users had materially depleted the usable and available stateline flows of the Arkansas River in violation of the Compact. Kansas further alleged that Colorado had blocked Kansas' efforts to have the Compact Administration investigate its complaints.

On February 18, 1986, Colorado filed a brief in opposition to Kansas' Motion for Leave to File Complaint. The thrust of that brief was that Kansas had not made a "reasonable effort" to resolve its complaints through the Compact Administration, and that absent such an effort,

the Supreme Court should decline to hear the matter. (p. 1) Colorado stated that the question presented was whether Kansas had met its burden ". . . to demonstrate that a pending investigation of the Arkansas River Compact Administration is not an adequate means to vindicate its allegations of Compact violations." (p. 3) In its brief, citing certain documentary evidence, Colorado alleged that there was a "pending investigation" by the Compact Administration, that the Administration was not deadlocked or unable to act, and that Colorado had not refused to investigate Kansas' allegations. (pp. 8-9) However, Colorado did not file with the Supreme Court the same voluminous administrative record used to support its Motion before the Special Master.

In response to Colorado's brief, Kansas on March 3, 1986 filed a new motion in the alternative, either for leave to file its complaint, or to compel an investigation by the Compact Administration pursuant to Article VIII-H. In its supporting brief, Kansas outlined in further detail its view of efforts taken within the Compact Administration, and the alleged frustration of the administrative procedure. Thus, the question of whether the administrative process had been properly exhausted was clearly an issue in the pleadings before the Supreme Court.

The Supreme Court's Order stated simply:

> "The motion for leave to file a bill of complaint is granted. Defendant is allowed sixty days within which to file an answer."

Kansas contends that the Court made a choice between the alternatives presented in its Motion, and thereby disposed of the exhaustion issue. Colorado, on the other hand, argues that the Court's silence is not a basis for inferring intent, and had the Court intended to decide the exhaustion issue, it would have ordered argument and decided the issue explicitly.

The requirement of a motion for leave to file a complaint and the requirement of a brief in opposition do enable the Supreme Court to dispose of matters at a preliminary stage. (*Ohio v. Kentucky* (1973) 410 U.S. 641, 644) As the Court has explicitly recognized, its objective in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presents. (*Id.*) To this end, the Court has strongly suggested that granting an original plaintiff's motion for leave to file complaint amounts to a rejection of arguments that the case should be dismissed. (*Maryland, et al. v. State of Louisiana* (1981) 451 U.S. 725, 740, fn. 16) Further, in the analogous case of *Texas v. New Mexico* (1983) 462 U.S. 554. the Court intimated that "fundamental structural considerations," such as an interstate compact that accords each signatory state the power to veto authoritative commission action, may abbreviate inquiry into the question of whether an available remedy exists at the administrative level. (462 U.S. 54, 568-570)

It is not necessary, however, to decide Colorado's present Motion on the basis of the Supreme Court order. The Special Master is convinced that Kansas did make a reasonable effort to pursue its complaints through the Compact Administration, but because of the inherent limitations in that procedure, the parties reached an impasse. Indeed, the briefs and oral argument on the Motion dealt primarily with the substance of the efforts before and by the Compact Administration, and not upon the Supreme Court order.

First, with respect to post-Compact well development, Kansas cites numerous law reviews and other secondary sources to show that unregulated well development, and its impact on surface water users, has been a problem for many years. (Kan. Br., pp. 30-31) By 1983 Kansas began its own study of the decline in flows of the Arkansas River, and the development of upstream wells in Colorado as a possible cause. Completed in 1984, that study concluded that for the

period 1974 to 1981 a conservative estimate of the stateline depletions due to post-Compact wells in Colorado was 40,000 to 50,000 acre-feet per year. (Appendix Exh. 21, p. iii) Colorado and the Compact Administration were aware of that study. Nonetheless, Colorado contends that Kansas did not formally seek a Compact investigation of this issue until February of 1985. (Colo. Closing Br., pp. 21, 27) Assuming that to be true for purposes of this Motion, there is no question that on March 28, 1985 the Compact Administration directed a formal investigation of the depletion of stateline flows. A number of potential causes were to be investigated, including specifically "well development of the waters of the Arkansas River in Colorado," as well as "the operation of the Trinidad Dam and Reservoir project." (Appendix Exh. 28, attached Exh. L)

The Compact Administration Resolution directed that the investigation be undertaken by a committee consisting of the Director of the Colorado Water Conservation Board and the Chief Engineer of Kansas, or their respective designees. Thus, the same unanimity requirements that limited the Administration itself were carried over into the structure of this investigation. Finally, the March 28 Resolution called for the investigation to be completed by the next annual meeting of the Compact Administration on December 10, 1985.

The engineers for the two states met promptly, but were unable initially to agree upon a scope of work for the investigation. (Appendix Exh. 29) At their next meeting they agreed to defer consideration of a complete scope of work, and defined instead a preliminary scope that included the compilation of certain data and construction of a series of mass diagrams. (Appendix Exh. 30, p. 2) The mass diagrams were presented at their meeting on July 12, 1985, but again the two engineers were unable to agree "about what the diagrams did or did not show." (Appendix Exh. 32, p. 4) Finally they decided to prepare and exchange separate reports analyzing the mass curves, and recommended that

the Compact Administration hold a special meeting on October 8, 1985 to receive such report as the committee might be ready to make. (*Ibid.*) The committee met once again on September 17, "... but was unable to agree on the conclusions to be drawn from the single and double mass diagrams and on what further investigation, if any, should be undertaken." (Appendix Exh. 34, pp. 4) J. William McDonald, the Colorado representative on the committee, reported to the Compact Administration that the committee had "reached an impasse" at its September 17 meeting. (Appendix Exh. 36, p. 2)

Against this background, the Compact Administration met on October 8, 1985. The Colorado representative acknowledged that there had been a "substantial decline in usable stateline flows starting in 1974." (Appendix Exh. 36, p. 4) However, he did not see post-Compact well development as the cause. He stated:

> "It seems to me that all the engineering shows thus far is that there has been a decline in usable stateline flows starting in 1974, which corresponds it appears to me, to a decline in tributary inflow rather than to well development or any other beneficial development in the Arkansas River basin in Colorado." (Appendix Exh. 37, p. 32)

Colorado therefore took the position that the investigation should first examine neither the well issue nor the operations of Trinidad Reservoir, but (1) reduced diversions by ditches in Colorado Water District 67; (2) the operating plan for John Martin Reservoir; (3) decreased plains precipitation; and (4) soil conservation measures. (Appendix Exh. 37, p. 35)

With respect to well development, the Colorado representative stated:

> "In that context I do not believe it is appropriate to launch an investigation of well pumping in Colorado as David (David Pope, Kansas State Engineer) has urged in his second report until we have determined whether the declines in usable stateline flows might be the result of other causes, which I believe to be more likely than the causes which David has addressed. ... And it has been my position therefore that the investigation should indeed continue, but it should start first with those factors which at this point in time appear to be most likely explanations for the decline in usable stateline flows." (Appendix Exh. 37, pp. 31-32)

Kansas, on the other hand, urged that the investigation proceed to examine ten possible causes for the decline in stateline flows, including all those suggested by Colorado, and including well development and the operations of Trinidad Reservoir. (Appendix Exh. 37, pp. 35-36) The Compact Administration finally adopted a Resolution that the committee continue its investigation only of those matters mutually agreed upon, that is, the four items suggested by Colorado. (Appendix Exh. 37, pp. 37-38)

Colorado now argues that it did not "rule out" an investigation of the impact of post-Compact wells on stateline flows, but neither did it commit that Kansas' complaints would ever be investigated. (Colo. Closing Br., p. 28; Appendix Exh. 37, p. 33) The facts are that in March the Compact Administration directed an investigation of post-Compact well development and the operations of Trinidad Reservoir, as possible causes among others for the decline in stateline flows. The investigation was to have been completed within the year. Yet by October, at Colorado's insistence, those two matters had been dropped from the

committee's investigation agenda. Kansas had a right to have its complaints "promptly investigated" and not side tracked by Colorado's belief that other factors might have more likely caused the decline in stateline flows. (Article VIII-H)

The well issue came up again at the Compact Administration's annual meeting on December 10, 1985. Kansas asked Colorado directly whether it would be ". . . willing to immediately begin a prompt and expeditious investigation of post-Compact alluvial well development in the Arkansas River Basin in Colorado. (Appendix Exh. 39, p. 107) Kansas never received an affirmative reply.

At that meeting, Kansas also presented a report from the nationally known consulting firm of S. S. Papadopulos and Associates. The report concluded that the investigation methodology proposed by Colorado, namely, focusing first on separate factors like climatic conditions, would not "produce meaningful conclusions regarding the alleged violations"; that the various possible factors must be examined contemporaneously, "regardless of preconceived notions as to the relative effects of any one factor"; and that studies had demonstrated that ground-water development and reservoir regulation "impact significantly the streamflow conditions within the river system," and "must be included" in order properly to investigate Kansas' allegation. (Appendix Exh. 39, Exh. E, pp. 5-6)

Kansas filed its motion with the Supreme Court six days later on December 16, 1985, having previously announced after the October 8 meeting that the States were at an impasse, and that such an action was being prepared. (Appendix Exh. 38)

Turning now to the operations of Trinidad Reservoir, Colorado concedes that Kansas first complained about this issue in 1980. (Colo. Br. pp. 9, 24) Through an administrative practice known as "rollover," Kansas alleged that additional

water was stored in Trinidad Reservoir, in violation of the Compact. The Administration found that the amount in volved for 1979 was 18,290 acre-feet. (Appendix Exh. 13) At a Compact Administration meeting in 1980, Kansas sought to have the Administration recommend that the State Engineer of Colorado order the release of such stored water, but Colorado voted "no." (Appendix Exh. 13, Colo. Br. p. 9) The rollover practice was continued, and Kansas contends that by 1982 some 58,514 acre-feet of water had been illegally stored. (Kansas' Response, p. 27) Admittedly, Kansas sought arbitration of this issue in 1982, in 1983 and again in 1985. (Appendix Exh. 16, pp. 78, 87; Exh. 28, pp. 168-170) Colorado declined, due to the "failure of the State of Kansas to identify the underlying factual basis for its claims." (Appendix Exh. 16, pp. 88, 85)

In 1983, therefore, Kansas undertook its own study, hiring Simons, Li & Associates, Inc. That study was completed in February, 1984 and concluded in part:

> "Since 1979, the Trinidad Project has been operated in a manner different than that envisioned by the Bureau of Reclamation and that approved by the Compact Administration. It is estimated that these deviations in the Trinidad Project operation have caused an additional 26,000 to 35,000 acre-feet of depletions to downstream water users." (Appendix Exh. 21, p. iii)

As previously indicated, the Trinidad issue was finally included as part of the investigation authorized by the Compact Administration on March 28, 1985. However, like the well development issue, Trinidad was dropped on October 8, 1985.

Colorado's principal argument with respect to Trinidad Reservoir is that reservoir operations are currently being reviewed and analyzed by the United States Bureau

of Reclamation. Colorado claims that the Bureau's study, which was begun in 1984, embraces all of Kansas' complaints. The study was requested by the Compact Administration following the Simons, Li report, but was also independently required as part of a five-year review procedure. The Bureau's final report is expected at any time. Two draft reports have been issued earlier, and Kansas maintains that there are both "methodological and legal objections" to the last draft. (Kansas Response, p. 29) However, the scope and efficacy of the Bureau's study are not the issue. There is nothing to show that a routine, though timely, study by the Bureau constitutes a Compact investigation. Indeed, the Compact administration presumably would not have included the operations of Trinidad Reservoir within its March 28, 1985 investigation if the Bureau's study had been intended to serve that function. The Bureau's study may provide valuable data on the issue, but it is not a substitute for action by the Compact Administration to investigate Kansas' complaints.

The decline of Arkansas River flows into Kansas appears to be admitted. At issue are the cause or causes, and whether Compact violations are involved. Kansas has made good faith allegations of such violations, and has pre sented preliminary studies to support its position. Certainly the future effectiveness of the Compact Administration re quires timely resolution of these allegations. However, the Administration structure is such that even a preliminary investigation of the allegations has not proceeded. By exercising its veto on the Commission, though done in good faith, Colorado has effectively prevented "authoritative Commission action." (cf. *Texas v. New Mexico*, *supra*, 462 U.S. 554, 568)

The Special Master believes that Kansas has met its obligations under the law, and that returning these issues to the Compact Administration would not prove effective,

nor would further delay be fair. Accordingly, Colorado's Motion is hereby denied.

DATED: October 21, 1988

/s/ Arthur L. Littleworth

Arthur L. Littleworth
Special Master